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No. 98-1381

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

AMERITECH CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS AT&T CORP., MCI WORLDCOM, INC., COMPETITIVE TELECOMMUNICATIONS ASSOCIATION AND TELECOMMUNICATIONS RESELLERS ASSOCIATION

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LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

AT&T Corp. has an equity or debt interest in the following publicly traded companies:

Cablevision Systems Corporation
Interactive Network, Inc., and
Telewest Communications PLC.

Competitive Telecommunications Association ("CompTel") is the principal national industry association representing competitive telecommunications carriers and their suppliers. Its nearly 315 members include large nationwide companies as well as scores of smaller regional carriers. CompTel has not issued shares or debt securities to the public. CompTel does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

MCI WORLDCOM, Inc. has the following non-wholly-owned subsidiaries:

American Communications Services, Inc.
Cogni-Case, Inc.
Embratel Participacoes S.A.
General Communication Inc.
Genesys Telecommunications Laboratories Inc.
News T Investments, Inc.
News Triangle Finance, Inc.
Portugal Telecom

Telecommunications Resellers Association ("TRA") is an incorporated trade association representing over 800 resale

carriers and their underlying product and service providers. TRA has no parent companies or subsidiaries.

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INTRODUCTION

In this petition, incumbent local exchange carriers (LECs) are asking this Court summarily to reverse a decision of the Eighth Circuit by vacating, in its entirety, the FCC Order that the Eighth Circuit reviewed: the Third Report and Order in the FCC's local competition rulemaking.[1] The LECs claim that this Court's intervening decision in *AT&T Corp. v. Iowa Utilities Board* requires this result.[2] However, far from undermining the Eighth Circuit's decision, *AT&T Corp.* eliminates any basis for the arguments that the LECs advanced below and forecloses the relief they seek. Petitioners thus do not and cannot contend that the Eighth Circuit's decision contains any error. Moreover, because the specific FCC regulation that is nominally at issue (Rule 319) has already been vacated by *AT&T Corp.* (on grounds that were not raised or decided in this Eighth Circuit decision), and the LECs have therefore already obtained all the relief to which they are entitled, the only purpose that this petition could serve would be to allow illicit attempts to relitigate the other, independent questions that the FCC lawfully resolved in the *Third Order*.

In particular, the FCC's *Third Report and Order* clarified and reaffirmed the "shared transport" regulation (47 C.F.R. 51.319(d)(1)(ii)) that had been adopted in an earlier FCC order (the *First Report*) that this Court reviewed in *AT&T Corp.* In the Eighth Circuit, the LECs challenged the *Third Order* on the ground that the FCC had allegedly required LECs to lease to competitors combinations made up of the component parts of

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[1] *See* Third Order on Reconsideration, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd. 12460 (1997) ("*Third Order*") (Pet. app. 26a-87a).

[2] *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999).

their telephone networks ("network elements"), which, the LECs claimed, was inconsistent with the Eighth Circuit's earlier holding that LECs could not be obligated to offer network elements in combined form. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997). However, in the decision in this case, the Eighth Circuit distinguished its prior holding and rejected the LECs' challenge. Pet. app. 20a-21a. In *AT&T Corp.* this Court thereafter reversed the Eighth Circuit's prior decision and upheld the FCC's authority to require combinations of elements (*AT&T Corp.*, 119 S.Ct. at 736-38). This Court has thus eliminated the entire predicate for petitioners' challenges below to the *Third Order*. Petitioners therefore cannot dispute -- and do not dispute -- that the only claims that they raised in the Eighth Circuit were properly rejected.

Petitioners nevertheless ask this Court summarily to reverse the Eighth Circuit's decision because of this Court's independent holding in *AT&T Corp.* that the FCC, in determining which network elements should be made available to competitors, adopted an impermissible construction of the "necessary" and "impair" factors which Section 251(d)(2) of the Act requires the FCC to consider. Accordingly, this Court vacated FCC Rule 319, in which the FCC had identified the network elements (including shared transport) that were required to be made available. But that provides no basis for reversing the court of appeals. The Eighth Circuit decision that is the subject of the instant petition did not in any way address or concern Section 251(d)(2) or its "necessary" and "impair" factors because, as the Eighth Circuit expressly noted, the LECs raised no claim relating to Section 251(d)(2). Pet. app. 18a.

Nor, contrary to petitioners' claim, does the fact that Rule 319 has been vacated either require or permit summarily

vacating the *Third Order* itself. Indeed, petitioners' claim is foreclosed by *AT&T Corp.* For after vacating Rule 319, the Court went on in that case to address numerous other aspects of the FCC's definitions of individual network elements and decided the very claims about combinations that were the predicate for the LECs' challenge to the *Third Order*. That Rule 319 had been vacated did not lead this Court to vacate these *other* aspects of the *First Report and Order*. Thus, the vacation of Rule 319 for noncompliance with § 251(d)(2) neither moots the unrelated other issues that the *Third Order* and the Eighth Circuit decided nor permits vacating the *Third Order*.

In short, this petition has no legitimate objective. Because Rule 319 has been vacated in its entirety, there is now no FCC regulation presently requiring LECs to provide shared transport, and the FCC has initiated a new rulemaking proceeding to reconsider which network elements must be made available after full consideration of the factors set forth in § 251(d)(2). Petitioners have thus already received full relief with respect to the FCC's error in construing Section 251(d)(2). The only impact of reversing the court of appeals decision and vacating the *Third Order* would be improperly to permit petitioners to attempt to relitigate other issues that have nothing to do with Section 251(d)(2) and that were properly and finally resolved against them by the FCC, the courts, or both.

STATEMENT OF THE CASE

1. **The Telecommunications Act of 1996.** Like *AT&T Corp.* v. *Iowa Utils. Bd.*, 119 S.Ct. 721 (1999), this case arises out of the Telecommunications Act of 1996, an act that "fundamentally restructures local telephone markets" with the goal of introducing meaningful competition to the local

exchange market. *AT&T Corp.*, 119 S.Ct. at 726. In addition to prohibiting states from "enforc[ing] laws that impede competition," the Act requires monopoly LECs to "share [their] network[s] with competitors" in order to "facilitate market entry." *Id.* Specifically, Section 251(c)(3) of the Act, 47 U.S.C. § 251(c)(3), requires incumbent LECs to make certain "network elements" -- the equipment and facilities they use to provide telecommunications services -- available at cost-based rates to their competitors.

Three provisions of the Act are of particular relevance in defining the LECs' duty to provide access to unbundled network elements, and have been the subject of prior litigation among the parties. First, Section 153(29) (47 U.S.C. § 153(29)), defines the term "network element," and thus defines the universe of elements that are potentially subject to the unbundling obligation. Second, the FCC is charged with determining which of those network elements must in fact be made available by LECs to their competitors, and Section 251(d)(2) (47 U.S.C. § 251(d)(2)) identifies two factors that the FCC is required to "consider, at a minimum," in making that determination: whether "access to such network elements as are proprietary in nature is necessary" and whether "the failure to provide access to such network elements would impair the ability of the [requesting carrier] to provide the services that it seeks to offer" (the "necessary" and "impair" factors). Third, Section 251(c)(3) (47 U.S.C. § 251(c)(3)) addresses the terms on which LECs must offer access to those elements that they must make available -- requiring, for example, that the elements be made available "on an unbundled basis" and on "nondiscriminatory" terms. This case involves only the first and third of those provisions.

2. **The First Report and Order**. In compliance with its duty to establish regulations implementing section 251 within

six months of enactment of the 1996 Act (47 U.S.C. § 251(d)(1)), the FCC issued its *First Report and Order* in its "local competition" docket on August, 8, 1996.[3] Among other matters, the *First Report and Order* adopted a series of determinations that relate to the LECs' obligations with respect to unbundled network elements and that are of relevance here.

First, the FCC identified seven "elements" of the incumbents' networks. Those elements are: (1) the "local loop" (the wires connecting customers' premises with the phone company's switches); (2) the "network interface device" (which connects the loop to the customer's inside wiring); (3) switching; (4) "interoffice transmission facilities" (the wires that connect one switch to another); (5) "signaling networks and call-related databases"; (6) "operations support systems"; and (7) operator services and directory assistance. 47 C.F.R. 51.319. In identifying these seven network elements, the FCC rejected claims that some of these facilities or functions did not qualify as "network elements" under Section 153(29)'s definition of "network element."[4] Further, in addressing "interoffice transmission facilities," also known as "transport," the FCC distinguished between two types of transport, both of which it defined as network elements: "dedicated transport," a transport facility used uniquely by one carrier, and "shared transport," a transport facility shared by multiple carriers.

Second, the FCC construed Section 251(d)(2)'s "necessary and impair" factors as having been met whenever "the failure of

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[3] *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996) ("*First Report and Order*").

[4] *First Report and Order*, ¶¶ 413, 516.

an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network."[5] The FCC considered those factors in light of that construction, and then determined that each of the seven network elements must be made available to competitors.[6] Significantly, the FCC embodied its conclusions with respect to both the identification of network elements and the duty that each be made available in one rule -- Rule 319 -- which contained definitions of each network element and stated that they had to be made available to competitors. 47 C.F.R. § 51.319.

Third, the FCC held that Section 251(c)(3) did not require or permit it to impose a facilities-ownership requirement on the use or leasing of network elements.[7] In other words, the FCC concluded that a new entrant could choose to lease all of the incumbent's network elements and provide service without supplying any elements of its own (the "all elements rule").

Fourth, the FCC applied the nondiscrimination requirement of Section 251(c)(3) to hold that when requesting carriers lease two or more elements, the incumbent LECs are prohibited (except upon request) from disconnecting elements that are currently combined within their networks (Rule 315(b)). 47 C.F.R. § 51.315(b).

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[5] *Id.*, ¶ 285.

[6] *First Report and Order*, ¶¶ 388-89, 419-20, 446-47, 481-82, 490-91, 497-99, 521-22, 539-40.

[7] *First Report and Order*, ¶¶ 329-334.

3. **The Eighth Circuit's Review of the First Report and Order In *Iowa Utilities Board*.** On review, the court of appeals upheld the FCC's identification of the seven network elements against claims that some were outside the statutory definition of "network element" and against claims that the FCC had misconstrued Section 251(d)(2)'s "necessary" and "impair" standards. In particular, it rejected the LECs' challenge to the FCC's conclusion that operator services and directory assistance, vertical features of the switch, and operations support systems are "network elements" under Section 153(29), holding that the FCC's conclusion that each of these functionalities fell within the Act's definition of "network element" was reasonable.[8] The Eighth Circuit likewise concluded that the FCC's application of the "necessary" and "impair" standards, as well as its adoption of the "all elements rule," were reasonable constructions of the Act's terms.[9] However, concluding that the term "unbundled" meant "separated," and that any other construction of the term would impermissibly make the provision of service through network elements too similar to the provision of service through resale, the Eighth Circuit invalidated the FCC rule (Rule 315(b)) that prohibited LECs from separating network elements that existed in combined form when providing those elements to their competitors. This last holding was rendered not in the court of appeals' initial decision, but in a decision on rehearing issued three months later.[10]

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[8] *Iowa Utils. Bd.*, 120 F.3d at 808-810.

[9] *Id.*, 120 F.3d at 811-812, 814.

[10] *Id.*, 120 F.3d at 813.

4. **The FCC's *Third Order*.** After issuance of the Eighth Circuit's original opinion, but before issuance of its decision on rehearing invalidating Rule 315(b), the FCC issued its *Third Order*. In that *Order*, the FCC resolved certain petitions for reconsideration and/or clarification that were filed in response to the *First Report and Order*. In particular, although the *First Report and Order* had clearly required incumbent LECs to provide access to both "dedicated" and "shared" interoffice transmission facilities, 47 C.F.R. § 51.319(d)(1), some of the incumbent LECs had claimed that Rule 319's requirement that LECs provide access to facilities that were "shared among more than one customer or carrier" simply meant that new entrants could choose to share among themselves dedicated facilities purchased from the incumbent, but that the rule did not require incumbent LECs to provide on a shared basis access to the same interoffice transmission facilities that carried the incumbents' own interoffice traffic. The FCC rejected this claim, and reaffirmed that its rule required LECs to provide access to the transport network that carried their own interoffice traffic. Pet. app. 44a-47a.

In reaffirming that obligation, the FCC also rejected LEC claims that the transport network could not be a network element under Sections 153(29) or 251(c)(3). It rejected, for example, petitioner Ameritech's contentions that the "statutory definition" of network element is limited to facilities that are "dedicated to a customer" or "identifiable as a limited or pre-identified portion of the network." Pet. app. 59a-60a (¶¶ 41, 43). It further rejected Ameritech's claims that shared transport unlawfully required LECs to provide network elements in combined form rather than "unbundled," a statutory term which Ameritech claimed meant "separate[d]." Pet. app. 59a (¶ 42).

In addition, although no party had challenged the FCC's separate determination that the "necessary" and "impair"

standards supported a finding that shared transport should be made available as a network element, the FCC *sua sponte* reaffirmed its prior decision that they did. Pet. app. 52a-57a.

5. **The Eighth Circuit's Review of the *Third Order*.** On review, the incumbent LECs raised only two challenges to the *Third Order*. First, petitioners claimed that shared transport constituted an unlawful "preassembled combinations of network elements" in conflict with the court of appeals' holding invalidating Rule 315(b). See Petitioners' Eighth Circuit Brief, pp. 22-30. Second, petitioners claimed that by requiring incumbents to provide access to shared transport the FCC had unlawfully "eliminate[d] the crucial distinction between [network elements] and resale," *id.* at 31. As the Eighth Circuit noted, "petitioners do not argue that the FCC failed to give adequate consideration to either [of the factors set forth in] 47 U.S.C.A. § 251(d)(2)" -- *i.e.*, the Act's "necessary" and "impair" standards. Pet. app. 18a.[11]

The Eighth Circuit rejected both of the challenges the LECs raised. It held that "the plain meaning of the statute supports the FCC's determination that shared transport is a network element as defined in section 153(29)," Pet. app. 17a, and "decline[d] at this time to consider" petitioners' claim that shared transport undermined the "distinction between unbundled access to network elements and resale" because that argument "is predicated on [] speculative assumption[s]" as to how shared transport will be priced. Pet. app. 18a-19a. Because no party had challenged the FCC's application of the

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[11] For the convenience of the Court, the undersigned respondents have lodged with the Clerk 11 copies of petitioners' brief in the Eighth Circuit. Nowhere in that brief do petitioners even mention section 251(d)(2).

"necessary" and "impair" standards, the Eighth Circuit's opinion did not address whether the FCC gave "adequate consideration" to those factors. Pet. app. 18a.

6. **This Court's Decision in *AT&T Corp.* v. *Iowa Utils. Bd.*** In *AT&T Corp.*, this Court reviewed the Eighth Circuit's decision in *Iowa Utilities Board*. Unlike the Eighth Circuit, which had invalidated a number of the FCC's rules on both substantive and jurisdictional grounds, this Court found only one aspect of the FCC's determinations in the First Report and Order unlawful. Specifically, this Court held that the FCC's construction of the "necessary" and "impair" standards failed to give "substance" to those factors. *AT&T Corp.*, 119 S.Ct. at 734-36. Concluding that the FCC had failed to "consistently appl[y]" a proper interpretation of the necessary and impair standards, this Court vacated and remanded Rule 319 in its entirety, including the provision (319(d)) requiring that shared transport be made available. *AT&T Corp.*, 119 S.Ct. at 736, 738-39.

At the same time that it vacated Rule 319 on the ground that the FCC did not consistently apply a proper construction of the "necessary" and "impair" factors, the Court reviewed on the merits "the incumbent LECs' complaint that the FCC included within the features and services that must be provided to competitors under Rule 319 items that do not (as they must) meet the statutory definition of network element[s]" set forth in Section 153(29). *AT&T Corp.*, 119 S.Ct. at 733-34. Thus, while the Court independently vacated Rule 319, including the obligation to provide access to each of the network elements, it nevertheless affirmed on the merits the FCC's determination to identify "operator services and directory assistance, operational support systems (OSS), and vertical switching functions" as network elements and include them "under Rule 319." *Id.* at 734. The Court further reversed the court of

appeals' decision to invalidate Rule 51.315(b), finding that rule to be a reasonable construction of the Act. *Id.* at 736-38.

The Court likewise held that the "Commission's refusal to impose a facilities-ownership requirement was proper," *id.* at 736, and rejected the LECs' claims that by requiring them to provide access to all of their network elements in already-combined form and "on forward-looking costs" the FCC "eviscerate[d] the distinction between resale and unbundled access." *Id.* at 737. In reaching each of these conclusions, the Court noted the possibility that its "remand of Rule 319 may render the incumbents' concern on th[ese] score[s] academic." *id.* The Court nevertheless affirmed each of these FCC holdings on the merits.

ARGUMENT

1. Petitioners rely for their claimed entitlement to relief on *Lawrence* v. *Chater*, 516 U.S. 163 (1996), the principal case setting forth the standard for a "GVR" in federal cases that are not moot. They thus imply that they are seeking "entry of a GVR." See Pet. 5. But petitioners do not in fact ask for a genuine "GVR" -- a "remand[] to the United States Court of Appeals . . . for further consideration" (see *Lawrence* v. *Chater*, 516 U.S. at 175) -- for they do not ask that the court of appeals be afforded the opportunity to consider whether this Court's decision in *AT&T Corp.* affects the validity of any of its holdings in this case.

Instead, petitioners ask that the Court vacate the *Third Order* and remand directly *to the FCC*. That would constitute summary reversal of the court of appeals' decision. The court of appeals denied the LECs' petition for review and upheld the *Third Order*, and petitioners seek to reverse that decision and vacate the order that the Eighth Circuit let stand. That

petitioners seek to bypass the court of appeals is evident from the face of their petition. See, *e.g.*, Pet. (i)–(Question Presented) ("Whether the *Third Order* should be vacated . . . ."); *id.* 5 ("that Order should be vacated and remanded to the FCC"). *Lawrence* v. *Chater* obviously does not support such extraordinary relief, and petitioners cite no precedent that does.

Moreover, this case plainly does not warrant either of the two components of the relief which petitioners seek: reversal of the court of appeals or *vacatur* of the *Third Order*. With respect to the court of appeals, there is no error to reverse. Petitioners do not and cannot claim that the Eighth Circuit committed any error, because *AT&T Corp.* reversed those aspects of the prior Eighth Circuit decision in *Iowa Utilities Board* on which petitioners had relied below (unsuccessfully) for their claims in this case. Indeed, it is beyond dispute that if this case had been consolidated with *AT&T Corp.* the aspects of the FCC's *Third Order* that were challenged in the court of appeals would have been affirmed.

Nor is there any basis for the Court to vacate the *Third Order*. As the Eighth Circuit expressly noted, the LECs did not raise before it a challenge to the FCC's application of the "necessary" and "impair" factors in the *Third Order*, Pet. app. 18a, and none of the FCC's holdings that the LECs did challenge before the Eighth Circuit were remotely undermined by this Court's decision in *AT&T Corp.*

Indeed, even had the LECs preserved a challenge to the FCC's application of the Section 251(d)(2) factors, that would not have provided any basis for vacating the *Third Order* -- just as there would have been no basis for the Court in *AT&T Corp.* to vacate the entire *First Report and Order* because Rule 319 was vacated. *See infra*, p. 14-16. Insofar as the *Third Order*, in contrast to the Eighth Circuit's decision reviewing the LECs'

challenges to that Order, did address the Section 251(d)(2) factors, petitioners have already received all the relief to which the Court's holding on Section 251(d)(2) entitles them. Rule 319 has been vacated, and thus no longer creates a legal obligation under FCC regulation to offer shared transport. The FCC has initiated a new rulemaking proceeding to reconsider its application of Section 251(d)(2) and determine which network elements should be unbundled, and will be considering shared transport along with the other network elements in that proceeding.[12] If any obligation to offer shared transport continues to exist in particular circumstances prior to the conclusion of that proceeding, it can only be the function of other sources of law, such as state law or private agreements. Thus, in light of the fact that the LECs' interests under *AT&T Corp.* are already fully protected, the only possible reason for petitioners to seek reversal of the court of appeals' judgment and vacatur of the entirety of the *Third Order* is to enable them to relitigate in the future other issues, apart from those relating to Section 251(d)(2), that were raised and resolved against them in the opinion below or that were resolved against them by the FCC and not appealed to the Eighth Circuit. But such relitigation would be patently improper.

2. Nor is there any basis for a genuine "GVR." The Court has cautioned that "[r]espect for lower courts, the public interest in finality of judgments, and concern about [the court's] expanding certiorari docket all counsel against undisciplined

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[12] Second Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, FCC 99-70 (rel. Apr. 16, 1999)

GVR'ing." *Lawrence* v. *Chater*, 516 U.S. 163, 174 (1996). For these reasons, the Court will generally GVR a federal appellate court judgment in only two circumstances. First, the Court will GVR a case that has "become moot due to circumstances unattributable" to the party that lost below, and "whose review [was thus] prevented through happenstance." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 23 (1994) (internal citations and quotations omitted). Second, the Court will consider a GVR where the court of appeals' judgment rested on a proposition of law that has been called into doubt by an intervening legal development, and there is therefore a "reasonable probability" that "the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). Neither of these criteria is remotely satisfied here.

a. Petitioners do not even claim that this case has become moot, and with good reason. The litigation before the court of appeals concerned only two issues: (1) whether shared transport was an unlawful combination of elements in violation of Section 251(c)(3), and (2) whether defining shared transport as an element undermined the Act's purported distinctions between network elements and resale. Neither of these claims was rendered moot and unreviewable by this Court's decision to remand Rule 319 to the FCC for reexamination under a different construction of the "necessary" and "impair" factors.

The leading and controlling case for this proposition is the Court's decision in *AT&T Corp.* In that decision, the Court recognized that the FCC's conclusions that particular facilities and functions, such as operator services, constituted network elements under the statutory definition were embodied in Rule 319 (see *AT&T Corp.*, 119 S.Ct. at 734) -- the same rule that the Court simultaneously "invalidate[d]" as a result of the

FCC's error in construing Section 251(d)(2). *Id.* at 738. The Court likewise recognized that the disputes over the "all elements rule" and whether the FCC's order eliminated an alleged statutory distinction between network elements and resale might have been rendered "academic" in light of the remand of Rule 319. *Id.* at 736-37. The Court nevertheless addressed each of these issues on the merits, because the FCC's constructions of the network element definition, the scope of section 251(c)(3)'s unbundling obligation, and the Act's relationship between resale and network elements present questions that are legally distinct from those relating to its construction of section 251(d)(2)'s "necessary" and "impair" factors. The Court could not have ruled on the various issues resolved in Parts IIIA, IIIC and IIID of its opinion if its invalidation of Rule 319 in Part IIIB had rendered those disputes moot and nonjusticiable.

Because the disputes addressed in the court of appeals decision are not moot, petitioners could have chosen to seek plenary review of those determinations. Since they were not deprived of the opportunity of having the lower court's opinion reviewed on the merits, the petitioners are not entitled to have the judgment GVR'ed on this basis.

Petitioners nonetheless claim that they are entitled to the relief they seek because "the *Third Order* alters the reach of a regulation that no longer exists." Pet. 5. But that was likewise true of each of the FCC holdings resolved on the merits in Part IIIA of this Court's opinion in *AT&T Corp.* Each of the determinations reviewed there -- the FCC's conclusions that OSS, operator services and directory assistance, and vertical switching functions are within the statutory definition of "network element" under Section 153(29) -- were embodied in (and hence "altered") a regulation that, as a consequence of this Court's resolution of the "necessary" and "impair" issue, "no

longer exist[ed]." The Court did not believe that the appropriate course in such a circumstance was to remand those determinations to the FCC, and therefore could not have believed that those disputes had become moot. There is no basis for taking a different course with respect to the similarly-postured issues addressed and resolved in the decision below.

Relatedly, petitioners claim that the Court should grant the relief they seek because its decision in *AT&T Corp.* requires the FCC to "revisit" the decision whether to require that shared transport be made available. Pet. 5. Again, the same is equally true with respect to each of the elements contained in Rule 319, including OSS, operator services and directory assistance, and vertical features. On remand, the FCC will have to "revisit" whether each one of these elements should be made available after reconsidering the "necessary" and "impair" factors. That did not lead the Court to remand the FCC's determinations that each qualified as a network element under section 153(29), or to refrain from issuing a valid and binding judgment resolving the LECs' challenge to those elements on that basis. It likewise provides no basis for a GVR here.[13]

b. Nor would this case qualify for a GVR under *Lawrence* v. *Chater*. Pet. 5. Petitioners do not and cannot identify any ground for finding that the Court below would or should reconsider its decision in light of this Court's decision in *AT&T Corp.*

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[13] The LECs also note that the FCC on remand of Rule 319 will have to decide whether switching should be made available, and that shared transport is of no use to a competitor without the LECs' switching element. Pet. 6. This argument is irrelevant for the same reason.

Each of the claims raised below -- whether shared transport satisfies the network element definition, whether shared transport is an unlawful combination of separate elements, and whether requiring that shared transport be made available impermissibly blurs a distinction between unbundled elements and resale -- is unrelated to any issue regarding the application of section 251(d)(2)'s "necessary" and "impair" factors. Therefore, this Court's holding that the FCC failed to apply a proper interpretation of the "necessary" and "impair" standards has no bearing at all on the questions resolved in the opinion below.

Far from undermining the lower court's opinion, *AT&T Corp.* confirms its correctness. The LECs' unsuccessful claims before the court of appeals were that the *Third Order* could not be reconciled with the Eighth Circuit's prior decision in *Iowa Utils. Bd.* that the LECs could not be required to provide access to preexisting combinations of elements, and that the FCC's unbundling decisions could not undermine the asserted statutory distinction between network elements and resale. Each of those prior rulings, however, was reversed in *AT&T Corp.* *AT&T Corp.* thus eliminated the entire predicate for the LECs' claims.

In light of this Court's opinion in *AT&T Corp.*, there can be little doubt as to how this Court would have handled the issues raised below had the *Third Order* been consolidated for this Court's review along with the other two orders that were the subject of *AT&T Corp.* This Court would have addressed, and rejected, the LECs' specific challenges to shared transport in Parts IIIA and IIID -- the portions of its opinion that addressed the scope of the definition of network element, the requirement that existing combinations be provided, and the question whether the duties imposed on the LECs improperly conflated unbundled elements and resale -- while independently

addressing section 251(d)(2)'s standards in Part IIIB. In order words, it would have affirmed, not vacated, the court of appeals' holdings on shared transport. There is no reason for a different result simply because the Eighth Circuit's decision reviewing the *Third Order* was issued too late to be consolidated with its two earlier decisions in *Iowa Util. Bd.* v. *FCC* and *California* v. *FCC*.

3. For these reasons, if the Court were to GVR to the court of appeals, the court of appeals would simply (and properly) reinstate its prior decision. The petitioners apparently recognize that a genuine GVR would thus win them nothing they do not already have, and that is presumably why they seek the more radical relief of a summary reversal. But that merely underscores the illegitimacy of such relief. Having already obtained the full relief to which they are entitled as a result of the FCC's error regarding Section 251(d)(2), petitioners now seek to leverage that relief so as to vacate other, independent determinations on other issues that were properly and with finality resolved against them. There is no sound or equitable reason, however, to subject respondents to the burden of relitigating issues that are unaffected by the Court's construction of section 251(d)(2)'s "necessary" and "impair" factors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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